

**PROGRAMMATIC AGREEMENT
REGARDING
THE DENNY WAY/LAKE UNION CSO CONTROL PROJECT**

**BETWEEN
KING COUNTY DEPARTMENT OF NATURAL RESOURCES (Lead Local Agency),
SEATTLE PUBLIC UTILITIES,
U. S. ENVIRONMENTAL PROTECTION AGENCY (Lead Federal Agency),
U. S. ARMY CORPS OF ENGINEERS,
WASHINGTON STATE OFFICE OF ARCHAEOLOGY AND HISTORIC PRESERVATION,
AND ADVISORY COUNCIL ON HISTORIC PRESERVATION**

WHEREAS, Seattle Public Utilities (**Seattle**) and King County Department of Natural Resources (**King County**) propose to construct and operate Phases 2 and 3/4, respectively, of the Denny Way/Lake Union Combined Sewer Overflow Control Project. The Denny Way/Lake Union Combined Sewer Overflow Control Project is a multi-phase, construction project comprised of three phases: Phase 1 (**Seattle** sewer system improvement segment completed in 1997), Phase 2 (**Seattle** pipeline connection between Phase 1 and **King County** facilities), and Phase 3/4 (**King County** project including tunnel, control facility, outfalls, pipelines, and associated structures); and

WHEREAS, **Seattle** proposes to construct Phase 2 and **King County** proposes to construct Phase 3/4 partially with grants from the U. S. Environmental Protection Agency (**EPA**), under the FY 94 Appropriations Act, and in compliance with the CEQ regulations (40 CFR Parts 1500-1508) and **EPA**'s National Environmental Policy Act (NEPA) regulations (40 CFR Part 6, Subparts A-D); and

WHEREAS, **King County** will require a permit from the Army Corps of Engineers (**COE**) under Section 404 of the Clean Water Act, and potentially under Section 10 of the Rivers and Harbors Act, to construct the project; and

WHEREAS, **EPA** has been designated the lead federal agency role for National Historic Preservation Act Compliance with the **Council**, **COE** and Washington State Office of Archaeology and Historic Preservation (**SHPO**) participating as consulting/concurring parties; and

WHEREAS, **EPA** and **COE** have determined that Phases 2 and 3/4 may have an effect on properties which may be eligible for inclusion in the National Register of Historic Places, and have consulted with the **SHPO** and the **Council** pursuant to 36 CFR 800.14(b) of the regulations implementing Section 106 of the National Historic Preservation Act (16 U.S.C. 470f) (NHPA); and

WHEREAS, the consulting parties have considered the applicable requirements of the Native American Graves Protection and Repatriation Act (25 U.S.C. 3001 *et. seq.*) (NAGPRA) and Washington's Indian Graves and Records Act (Chapter 27.44 RCW) in the course of consultation; and

WHEREAS, this Agreement addresses **Seattle**'s Phase 2 and **King County**'s Phase 3/4, as described in the Final SEPA Environmental Impact Statement and NEPA Environmental Assessment, July, 1998.

NOW, THEREFORE, **King County**, **Seattle**, **EPA**, **COE**, **SHPO** and the **Council** agree that the undertaking shall be implemented in accordance with the following stipulations in order to satisfy Section 106 responsibilities for all aspects of Phases 2 and 3/4.

STIPULATIONS

EPA shall ensure that the following measures and stipulations are carried out:

- I. As defined in 36 CFR 800.16, an “Historic Property” is any prehistoric or historic district, site, building, structure, or object included in or eligible for inclusion in the National Register of Historic Places. Historic properties include artifacts and remains that are related to and located within such properties. Traditional cultural properties, as defined in the National Park Service’s National Register Bulletin 38: Guidelines for Evaluating and Documenting Traditional Cultural Properties, are also included as Historic Properties.

However, this agreement uses the term “historic property” as any building or structure over fifty years old and constructed by Euro-Americans and included in or eligible for inclusion in the National Register of Historic Places. All other properties as defined under 36 CFR 800.16 are considered “archaeological resources” in this agreement.

- II. **Seattle** (hereinafter “grantee” for purposes of Phase 2) is responsible for tasks assigned to Grantees for Phase 2. **King County** (hereinafter “grantee” for purposes of Phase 3/4) is responsible for tasks assigned to Grantees for Phase 3/4. Documentation for Phases 2 and 3/4 will be provided separately, except where identified. King County and/or Seattle have completed some of the stipulations; therefore, each stipulation section includes information on completion schedules.

III. Inventory, Evaluation and Effect Determination

Historic properties inventory, evaluation and effect determination for Phase 3/4 and for a portion of Phase 2 have been completed. Before construction, **Seattle** will have a consultant complete an historic properties inventory, evaluation and effect determination for the remainder of their Phase 2 project area as per the following measures. Traditional cultural properties have not been found within the project area.

A. Historic Properties Inventory

1. **Grantees** will ensure the completion of an historic properties inventory of the area of potential effects prior to Notice to Proceed. An appropriate level of inventory will be determined in consultation with the **SHPO**, and the inventory will be conducted in a manner consistent with the Secretary of the Interior’s Standards and Guidelines for Identification of Historic Properties.
2. **Grantees** will ensure the completion of a traditional cultural properties archival inventory of the area of potential effects prior to Notice to Proceed. The inventory will be conducted in a manner consistent with the National Park Service’s National Register Bulletin 38: Guidelines for Evaluating and Documenting Traditional Cultural Properties. If any traditional cultural properties are found during the inventory phase, **Grantee(s)** will provide National Register evaluation as per III.B.2 below.
3. **Grantees** will distribute all inventory reports to **EPA**, **COE** and **SHPO** for 30-day review and comment.

B. National Register Evaluation

1. **Grantees**, on behalf of **EPA** and **COE**, and in consultation with **SHPO**, will follow the procedures described at 36 CFR 800.4(c) to evaluate the historical significance of all properties that may be affected by Phases 2 and 3/4. If **Grantee(s)** and **SHPO** do not agree on the National Register eligibility of any properties, **Grantee(s)** will request **EPA**'s and **COE**'s comments on the issue. If **SHPO**, **EPA** and **COE** are unable to reach agreement regarding eligibility, or if the **Council** or the Secretary of the Interior so requests, **EPA** will obtain a formal determination of eligibility from the Secretary of the Interior pursuant to 36 CFR 800.4(c)(2).
2. If potential traditional cultural properties are identified through archival inventory, **Grantee(s)** will seek the participation of Native American Tribal Governments and other traditional practitioners who ascribe traditional cultural value to those properties in applying the National Register criteria and evaluating their historical significance.
3. **Grantee(s)** will provide **EPA** and **COE** with documentation of **Grantee(s)**'s findings of eligibility and of the **SHPO**'s comments regarding eligibility.

C. Assessing Effects

1. **Grantee(s)** shall, on behalf of **EPA** and **COE**, apply the Criteria of Adverse Effect at 36 CFR 800.5(a) to all properties determined to be eligible for inclusion in the National Register of Historic Places pursuant to Stipulation II(B), National Register Evaluation. **Grantee(s)** will provide **EPA**, **COE**, **SHPO**, and **Council** with an opportunity to review and comment on their findings of effect for each portion of Phases 2 and 3/4 before authorizing construction to proceed. The findings of effect will be submitted by **Grantee(s)** to the **EPA**, **COE**, **SHPO**, and **Council** for 30-day review.
2. **Grantee(s)** will ensure that the appropriate Native American Tribal Governments are consulted in assessing effects regarding traditional cultural properties.
3. If **Grantee(s)**, **EPA** and **SHPO** agree that any portion(s) of Phases 2 and/or 3/4 will have no effect on any National Register listed or eligible properties, **Grantee(s)** may provide authorization to proceed with construction in such area(s), subject to the conditions of the Monitoring Plans (see Stipulation VII and Attachments 1 and 2).

IV. Preparation of Treatment Plans

- A. **King County**, in consultation with **EPA**, **COE**, **SHPO**, and affected Native American Tribal Governments, developed an Historic Property Treatment Plan (January 22, 1999) (see Attachment 1) and an Archaeological Resources Treatment Plan (August 1998) (see Attachment 2) for the mitigation of anticipated effects resulting from construction and/or operation of Phase 3/4 on eligible historic properties that cannot be avoided. The Historic Property Treatment Plan includes Phase 3/4 and a portion of Phase 2. Before construction, **Seattle** will have a consultant complete an addendum to the historic property treatment plan for the remainder of their Phase 2 project area as per the following measures. The Archaeological Resources Treatment Plan includes **Seattle**'s Phase 2. **Seattle**, in consultation with **EPA**, **COE**, **SHPO**, and affected Native American Tribal Governments, will develop an addendum to **King County**'s Historic Property Treatment Plan (see

Attachment 1) for the mitigation of anticipated effects resulting from construction and/or operation of Phase 2 on eligible historic structures or buildings that cannot be avoided.

- B. The Treatment Plans are/will be consistent with the Secretary of the Interior's Standards and Guidelines for Identification of Historic Properties (48 CFR 44716-44742) and Standards for Archaeological Documentation (48 CFR 44734-44737), the **Council's** handbook Treatment of Archaeological Properties (Advisory Council on Historic Preservation, draft 1980), applicable state regulations, and responsive to contemporary professional standards.
- C. **EPA**, in consultation with **COE**, will ensure that **Grantees** implement the Treatment Plans for the mitigation of anticipated effects on eligible properties.
- D. **Grantees**, in consultation with **SHPO**, will ensure the development of site specific Supplemental Treatment Plans as specified in Stipulation IV (F) below.
- E. **Grantees** will prepare Supplemental Treatment Plans (Supplements) for historic and/or archaeological properties identified during inventories for construction phases subsequent to approval of the Treatment Plan and for historic and/or archaeological properties discovered during construction. Supplements will be approved as per Stipulation III below. Each Supplement will modify the appropriate existing Treatment Plans to be site and property specific. Additional information shall include:
 - 1. The historic and/or archaeological properties discovered or to be affected in the specified project segment and the nature of those effects.
 - 2. Proposed measures to mitigate or avoid adverse effects to historic properties identified.
 - 3. Where data recovery is proposed to mitigate an affected eligible property, the supplement will contain:
 - a. Specific research questions and an explanation of their relevance to the overall research goals as established in the Treatment Plans.
 - b. Site-specific fieldwork and analytical strategies that will be employed in data recovery.
 - c. Methods for securing the site against vandalism, if not already protected.
 - d. Schedule for submission of progress, summary and other reports to **EPA**, **COE**, **SHPO**, and **Council**.

V. Comments and Concurrence on Supplemental Treatment Plans

- A. **Grantee(s)** will submit, within 24 hours of determination of effect on an eligible property, any supplements to **SHPO**, **EPA** and **COE** for review. **SHPO**, **EPA** and **COE** will have a maximum of three working days upon receipt to review and provide comments and/or objections to **Grantee(s)**. If **SHPO**, **EPA** or **COE** do not submit comments and/or objections within these three working days, **Grantee(s)** shall take such non-responsiveness as concurrence.

- B. If any party has an objection to the Supplements, the objection must be specifically identified and the reasons for objection documented in writing to the **Grantee(s)**. Objections will be resolved according to the procedures in Stipulation XI, Dispute Resolution, of this Agreement.
- C. If revisions to the Supplement are needed, **SHPO, EPA** and **COE** have one working day to review the revisions. If no comments or objections are received within this time frame, **Grantee(s)** will assume concurrence.
- D. All Supplements will be deemed finalized when all revisions are made and concurred with by the reviewing parties, or any disputes have been resolved as per Stipulation XI, Dispute Resolution. Once finalized, Supplements will be provided to **SHPO, Council, COE, and EPA**. **Grantee(s)** may then issue authorization to proceed with implementation of the Treatment Plans and Supplements.
- E. Upon written approval from **SHPO, Grantee(s)** may issue authorization to proceed with construction of Phases 2 and 3/4 in those portions of the right-of-way that contain archaeological properties once agreed upon fieldwork/treatment specified in the Treatment Plans and Supplements has been completed.

VI. Changes in Construction Corridors and Ancillary Areas

If during the course of project planning or construction planning a reroute of a portion of the proposed right-of-way or a previously unidentified staging or use area is determined to be necessary, **Grantee(s)** shall contact **EPA** and **COE** of the project change and ensure that the area of potential effect is inventoried and evaluated in a manner consistent with Stipulation III, Inventory, Evaluation and Effect Determination. If historic and/or archaeological properties will be affected, a Supplemental Treatment Plan will be prepared in consultation with **SHPO** and in a manner consistent with Stipulation IV (F).

VII. Monitoring Plans for Construction

- A. **King County**, in consultation with **EPA, COE** and **SHPO**, has prepared an Historic Property Monitoring Plan (August 1998) and an Archaeological Resources Monitoring Plan (January 22, 1999) (see Attachments 1 and 2) to ensure compliance of Phase 3/4 with the Treatment Plans and Supplements. **Seattle's** Phase 2 is included in **King County's** Archaeological Resources Monitoring Plan. Before construction of Phase 2, **Seattle**, in consultation with **EPA, COE, and SHPO**, will prepare an addendum to **King County's** Historic Property Monitoring Plan for the portion of Phase 2 not included in the King County monitoring plan.
 - 1. The Monitoring Plans specify the location of all listed and eligible properties to be avoided and the means by which they will be marked and avoided, if construction is allowed in nearby portions of the right-of-way.
 - 2. The Monitoring Plans also specify areas where pipeline trench excavation will be monitored (e.g., trench excavations in native soils, close to eligible buildings).
 - 3. During the construction phase, monthly progress reports regarding monitoring activities will be submitted to the **SHPO**.

- B. The Archaeological Resources Monitoring Plan shall also address actions to be taken if previously unidentified archaeological resources are discovered during construction. These discovery situations are addressed in the attached Archaeological Resources Monitoring Plan (see Attachment 2).

VIII. Curation

- A. **Grantees** shall ensure that all records and materials resulting from identification and data recovery efforts are curated in accordance with 36 CFR 79. **Grantees** will also consider any claims or conditions recognized as a result of consultation with affected Native American Tribal Governments according to the provisions of NAGPRA and NHPA. All material to be returned to their owners or otherwise repatriated will be maintained in accordance with 36 CFR 79 and Tribal claims or conditions until their analysis is complete and they are repatriated.
- B. **Grantees** will facilitate the involvement of appropriate Native American Tribal Governments in the decisions related to final disposition of archaeological artifacts.
- C. If a Native American Tribal Government or building owner objects to any element of the disposition, it may object in accordance with the procedures outlined in Stipulation XI, Dispute Resolution, except that objections regarding human remains and cultural items, as defined in NAGPRA, will be resolved between **Grantee(s)** and Native American Tribal Governments in accordance with NAGPRA. **Grantee(s)** shall notify **SHPO** of any such objections.

IX. Native American Human Remains

- A. In the case of inadvertent discovery of Native American burials or Native American human remains during construction, archaeological fieldwork, or laboratory analysis, **Grantee(s)** will attempt to identify the appropriate Native American Tribal Governments with cultural affiliation to the burial(s) or human remains and consult with them over the treatment of remains in accordance with applicable Federal and state law and tribal policy, and in accordance with procedures identified in the Archaeological Resources Treatment Plan.
- B. **Grantees**, in consultation with affected Native American Tribal Governments, will ensure that any human remains encountered during the course of Phases 2 and 3/4 are treated in a respectful manner.
- C. If objections are raised regarding treatment of human remains by any party to this Agreement, or by a Native American Tribal Government claiming cultural affiliation with the human remains, the objection will be resolved in accordance with Stipulation XI(C), Dispute Resolution.

X. Professional Qualifications

Grantees shall ensure that all historic preservation or archaeological resources work performed by **Grantees** or on their behalf pursuant to this Agreement shall be accomplished by or under the direct supervision of a person or person who meet(s) or exceed(s) the pertinent qualifications standard set out on the Secretary of Interior's Professional Qualifications Standards (48 CFR 44738-9).

XI. Dispute Resolution

- A. Unless otherwise specified in this agreement, should any signatory to this Agreement object in writing, within 30 days, to any findings, action(s) or plans provided for review pursuant to this Agreement, **Grantee(s)** shall consult with the objecting party to resolve the objection. Upon receiving the written objections:
1. **Grantee(s)** will notify **SHPO** and **EPA** as to the nature of the dispute.
 2. **Grantee(s)** will attempt to informally resolve said objections.
 3. In the event that these attempts are unsuccessful, **Grantee(s)** will invite the objecting party to a reconciliation meeting for the purpose of discussing the objections and resolving same. Such invitation will be issued no later than five working days after receipt of said objections and request that the meeting be held within 10 working days following receipt of the invitation. The time frames specified herein may be expedited by mutual, written agreement.
 4. If reconciliation meeting does not successfully resolve all issues, the dispute shall be escalated to the **Council** as per Stipulation XI(C) below. If the **SHPO** is not one of the disputing parties, **Grantee(s)** shall notify **SHPO** as to the nature of the dispute.
- B. Should any affected Native American Tribal Government object to any proposed plan, curation procedures or handling of Native American human remains, **Grantee(s)** shall consult with the objecting Native American Tribal Government to resolve the objection as per Stipulation XI(A) above.
- C. If **Grantee(s)**, in consultation with **EPA**, determines that an objection cannot be resolved through consultation pursuant to Stipulation XI(A), **EPA** will forward all documentation relevant to the dispute to the **Council**. Within 30 days of receipt of all documentation, the **Council** shall either:
1. Provide **EPA** with recommendations, which **EPA** shall take into consideration in reaching a final decision regarding the dispute; or
 2. Notify **EPA** that it will comment within an additional 30 days in accordance with 36 CFR 800.7(c). Any **Council** comment provided in response to such a request will be taken into account by **EPA** in accordance with 36 CFR 800.7(c)(4) with reference to the subject of the dispute.
- D. Any recommendation or comment provided by the **Council** will be understood to pertain only to the subject of the dispute; **Grantees'** responsibilities to carry out all actions under this Agreement that are not the subject of the dispute will remain unchanged.

XII. Amendment

Any party to this agreement may request that it be amended, whereupon the parties will consult in accordance with 36 CFR 800.14(b) to consider such amendment.

XIII. Termination

Any party to this Agreement may terminate it by providing 30 days written notice to the other parties, provided that the parties will consult during this 30-day waiting period to seek agreement on amendments or other actions that would avoid termination. In the event of termination, **EPA** will comply with 36 CFR 800.3 through 800.6 with regard to individual actions covered by this Agreement.

XIV. Failure to Carry Out the Terms of the Agreement

In the event that the terms of this Agreement are not carried out, **EPA** will comply with 36 CFR 800.4 through 800.6 with regard to individual actions covered by this Agreement.

XV. Scope of Agreement

This Programmatic Agreement is limited in Scope to **Seattle's** Phase 2 and **King County's** Phase 3/4 of the Denny Way/Lake Union CSO Control Project and is entered into solely for that purpose.

Execution and implementation of this Agreement evidences that EPA has afforded the Council the opportunity to comment and have, therefore, satisfied its Section 106 responsibilities for all individual actions of this undertaking.

KING COUNTY DEPARTMENT OF NATURAL RESOURCES

By: _____ Date: _____
Pam Bissonnette
Director

SEATTLE PUBLIC UTILITIES

By: _____ Date: _____
Diana Gale
Director

U. S. ENVIRONMENTAL PROTECTION AGENCY

By: _____ Date: _____
Randall F. Smith
Director, Office of Water, Region 10

U. S. ARMY CORPS OF ENGINEERS

By: _____ Date: _____
Colonel James M. Rigsby
District Engineer

WASHINGTON OFFICE OF ARCHAEOLOGY AND HISTORIC PRESERVATION

By: _____ Date: _____
Allyson Brooks
State Historic Preservation Officer

ADVISORY COUNCIL ON HISTORIC PRESERVATION

By: _____ Date: _____
John M. Fowler
Executive Director

ATTACHMENT 1

Historic Property Treatment and Monitoring Plan

ATTACHMENT 2

Archaeological Resources Treatment and Monitoring Plan